FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No.: LAKE 2008-608 A.C. No.: 11-03054-158242-01
v.	Docket No.: LAKE 2009-82 A.C. No.: 11-03054-166956-03
BIG RIDGE, INC., Respondent	Docket No.: LAKE 2009-378A A.C. No.: 11-03054-177990-03 Mine: Willow Lake Portal

DECISION AND ORDER

Appearances: Tyler P. McLeod, Esq., and Beau Ellis, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

R. Henry Moore, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon three Petitions for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The cases allege 101 violations of mandatory health and safety standards, but prior to hearing, the parties were able to settle all but three citations and one order issued to Respondent. The remaining citations, Citation Nos. 6679907, 6683969, and 6667482, are for alleged violations of 30 C.F.R. § 75.400, and remaining Order No. 6668437 is for an alleged violation of 30 C.F.R. § 75.364(a)(1). All four alleged violations were designated as significant and substantial (S&S). Citation Nos. 6679907 and 6683969 were designated as high negligence, and Citation No. 6667482 and Order No. 6668437 were designated as unwarrantable failures.

Respondent denies any violation in Citation No. 6679907. Respondent also denies the unwarrantable failure designations for Citation No. 6667482 and Order No. 6668437. In addition, Respondent denies the gravity and negligence findings, the S&S designations, and the appropriateness of the proposed civil penalties for all four violations.

A hearing was held on August 2-3, 2011 in Henderson, Kentucky before former Commission Administrative Law Judge Gary Melick. The parties introduced testimony and documentary evidence, and witnesses were sequestered.

Subsequently, Judge Melick retired from the Commission. A notice was then sent out to the parties that the case was re-assigned to the undersigned. The parties did not contest the re-assignment.

For the reasons set forth in the decision below, I modify Citation Nos. 6679907 and 6667482 to reduce Respondent's negligence from "high" to "moderate." I further modify Order No. 668437 to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," to delete the significant and substantial designation, and to increase Respondent's negligence from "high" to "reckless disregard." Furthermore, I modify Citation No. 6667482 to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, thus removing the unwarrantable failure designation. Based on said modifications and the failure of the Secretary to provide evidence or testimony supporting the special assessments of Citation No. 6667482 and Order No. 668437, I assess a total penalty of $67,378.00 for the four violations.

On the entire record,[1] and after considering the post-hearing briefs, I make the following:

II. Stipulated Facts

The parties stipulated to the following facts.

1. These dockets involve an underground bituminous coal mine known as the Willow Lake Portal Mine, which is owned and operated by Respondent, and located in Saline County, Illinois.

2. These dockets involve 101 charging documents, including 94 104(a) Citations, one 104(d)(1) Citation, one 104(d)(1) Order, and five 104(d)(2) Orders. Two 104(a) Citations, one 104(d)(1) Citation, and one 104(d)(1) Order remain in contest to be decided at hearing. The remaining Citations and Orders have been resolved, including all Citations in Docket LAKE 2008-676.

3. Respondent is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the coal mine at which the Citations and Orders at issue in this proceeding were issued.

[1] Since this case was re-assigned from Judge Melick after hearing, the scope of my credibility determinations are limited to the record before me. For obvious reasons, I do not rely on demeanor. In resolving conflicts in testimony, I have taken into consideration the interests of the witnesses in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

4. Respondent's operations affect interstate commerce.

5. Operations of Respondent at the coal mine at which the Citations and Orders were issued in this proceeding are subject to the jurisdiction of the Mine Act.

6. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

7. Respondent is a large operator.

8. Respondent demonstrated good faith in abating the cited conditions.

9. The certified copy of the MSHA Assessed Violations History reflects the history of the mine for the twenty-four months prior to the date of the Citations/Orders and may be admitted into evidence without objection by Respondent.

10. The parties stipulate to the authenticity of those exhibits produced to one another prior to hearing, but not to the relevance or truth of the matters asserted therein.

11. True copies of the Citations and Orders at issue in this proceeding were served on Respondent as required by the Mine Act.

12. The individuals whose signature appears in Block 22 of the Orders at issue in this proceeding were acting in their official capacities and as authorized representatives of the Secretary of Labor when the Citations and Orders were issued.

13. The 104(d)(1) Order No. 6668437 giving rise to the subject 104(d)(2) Orders was issued on November 29, 2007 and is still in contest in this proceeding.

14. The total proposed penalties for the Citations and Orders in this proceeding will not affect Respondent's ability to continue in business.

III. Background

Respondent operates the Willow Lake Portal Mine (WLPM), an underground, bituminous coal mine, in Saline County, Illinois. *Big Ridge*, 33 FMSHRC 689 (Mar. 2011) (ALJ). The mine is large and made up of several miles of belts and super units.[2] It contains several hundred pieces of equipment, and the air courses are at least eight miles long. Tr. 23-24. At least two

[2] A super unit brings ventilation up the center of a working section, and the ventilation is split in two directions. This allows two continuous miners to operate at the same time. A continuous miner operates on both the right and left sides of the section, and both machines run on separate splits of air. Tr. at 35-36.

inspectors are required to timely complete a quarterly inspection. Tr. 21-22. The mine is gassy and liberates over two million cubic feet of methane in a twenty-four hour period. Therefore, it is subject to a five-day spot inspection. Tr. at 24.

IV. Citation No. 6679907

A. Findings of Fact

1. Inspector Miller's Testimony

On September 19, 2008, MSHA coal mine inspector, Steven Miller,[3] conducted an E01 inspection of the tail roller area of the energized 1B belt conveyor belt for Unit 1. Mine representative, Charles Hendricks, accompanied Miller during the inspection when Miller issued Citation No. 6679907. Tr. at 74. The 104(a) citation alleged a violation of 30 C.F.R. § 75.400 because loose coal and float coal dust had accumulated under and along the tail roller area of the belt and in front of the feeder. The Citation states:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and along the Tail Roller area of the energized 1B Conveyor Belt. Accumulations of loose coal and float dust were also allowed to accumulate on both sides of and in front of the Unit 1 Stamler Feeder in this location as well. The accumulations measured approximately 6 inches to 48 inches deep, 12 feet to 17 feet wide, and 50 feet long. The bottom belt and roller were observed in these accumulations.

P. Ex. 26.

The alleged violation occurred about halfway through the second shift, which ran from 3:00 to 11:00 in the evening. Miller described the "float coal dust" as a "distinct black in color." *Id*. Miller determined that the dark color indicated that an obvious and serious violation had occurred because rock dust had not been recently applied to make the float dust inert. Tr. at 32-33. On cross examination, Miller conceded that he had not measured the depth of the rock dust on the roof and ribs and was unable to tell when rock dust was last applied to the area. Tr. 64-65.

Miller observed four feet of coal accumulations at the feeder at the 1B conveyor belt tail. P. Ex. 27 at 3. He opined that the accumulations were different from normal spillage. Tr. 34-35.

[3] Miller has been employed by MSHA for over twenty years since beginning his career with a mining engineering firm. His MSHA work has focused exclusively on underground coal mines. Miller has worked in the ventilation and roof control departments and served as lead accident investigator prior to accepting a position as field office supervisor. He has been inspecting Willow Lake since the mine's inception, and claims to have cumulatively inspected the mine "thousands" of times. Tr. 20-22.

He acknowledged that some unavoidable spillage is common any time coal is transferred in a mine. *Id*. He asserted, however, that "even the most inexperienced miner would have recognized an accumulation here." Tr. at 33-34. Miller stated that the foreman or miners should have "stopped the belt, cleaned the tail roller, scooped the feeder and put it back in service." Tr. at 35.

Miller concluded that the frictional contact between the accumulations and the tail roller was reasonably likely to cause a mine fire.[4] Miller opined that in the event of a fire, smoke would spread to the unit and contaminate the secondary escapeway and injure sixteen miners working in the immediate area. Tr. at 37-38. Miller testified that "miners would have been located in the face area," and that "depending on how far they were advanced from the belt," they could have been two to five crosscuts away from the cited location. Tr. at 38. Miller also testified that shuttle car or coal hauler operators were working in the face and would come to the cited location, "transporting coal from the face to the feeder area to dump." Tr. at 38. Miller further testified that the section foreman normally walks through the area to conduct on-shift inspections, and mechanics may walk across the area in order to do maintenance on equipment. Tr. at 38-39.

Miller described how a fire in the cited location would reach the area where the miners worked. He testified that:

> [A]nytime you have a fire -- I mean, ventilation on this, I'm not sure, I'd have to go back and look, but if the ventilation was coming in and going out to a belt regulator or if it was coming up the intake and coming to a belt and going out, I don't recall exactly there, but at best, all you've got is a plant check curtain inby that. It's flammable. It's going to burn, so you'd have the ventilation interrupting in the event you have a fire.

Tr. at 39.

At the time the citation was written, the mine had fire detection and suppression systems in place. Miller noted, however, that the mine had a history of problems with false or inoperative alarms in the CO monitors and heat sensors. Tr. at 40.

Miller concluded that the four feet of coal accumulations had been formulated over the course of a few shifts, or that someone had dumped coal in the wrong place. Tr. at 47. Miller determined that while some of the accumulation had been there "for some time," some of the coal had accumulated during the current shift. *Id*. Miller further determined that the operator had failed to scoop near the feeder. Tr. at 52. Miller claimed that he had checked with Hendricks for mitigating circumstances, but Hendricks provided none. Tr. at 47.

[4] On cross, Miller conceded that the only coal accumulations that were subject to friction from the belt were down in the tail roller. The accumulations at the feeder merely provided additional fuel, in the event of a fire. Tr. at 69. Accordingly, I find that the only ignition source was the accumulations that were grinding through the tail roller.

According to the Certified Violation History Report, the Willow Lake Portal was cited over 200 times in the previous two years for accumulation violations. The nature and location of the prior violations was not specified. P. Ex. 33.

Miller testified on cross-examination that he did not recall definitively which way the ventilation flowed in the mine. He believed that the mine "had it in the ventilation plan [that the air could either] . . . go in or go out," but he was not positive. Tr. at 49. During the inspection, Miller had taken multiple methane tests, but did not detect any abnormal readings at the site of the accumulations. *Id*.

The ram cars carried about eight to ten tons of coal from the continuous miner to the feeder. The beds of coal on the cars were stacked four feet high and about seventeen to twenty feet long. Tr. at 49.

The continuous miners had water sprays to dampen the coal as it was mined. Tr. at 52-53. Miller, however, did not check the continuous miners to see if the water sprays were operating properly on the day of the citation. *Id*. He noted, however, that he would "question by the dryness of the coal float dust in the air how much water was being applied to the coal." Tr. at 53.

Miller designated the gravity of the violation as "reasonably likely" to result in "lost workdays or restricted duty" to sixteen persons, and thus S&S. He designated negligence as "high." P. Ex. 26.

2. Testimony from Respondent's Witnesses

On direct, Hendricks[5] testified that he did not recall whether he observed the tail roller grinding in coal on the day the citation was issued. Tr. at 76. Hendricks did recall that the coal around the feeder amounted to "normal accumulations," which inevitably occur during the production cycle, and that the cited condition likely developed during the shift. Tr. at 77. Hendricks further testified that since the coal was fresh off the continuous miner, which is equipped with water sprays, the coal was "somewhat wet." Tr. at 78. Hendricks further testified that the rim of the feeder was padded to prevent loose coal from accumulating in the direction of the tail roller, and that the position of the tail roller in relation to the feeder was such that spillage from dumping would not accumulate at the tail roller. Tr. at 76, 85. Like Miller, Hendricks did not detect any methane in the area around the feeder. Tr. at 79.

On cross examination, Hendricks testified that accumulations near the feeder could not come into contact with the belt and the tail rollers because of the belt barriers and "the configuration of the conveyor itself." Tr. at 85. He testified that he did not see any float coal dust in the air. Contrary to his inability to recall on direct, Hendrix testified on cross that he did

[5] Hendricks has over thirty years of mining experience. At the time the citation was issued, Hendricks was employed as the outby Supervisor at Willow Lake and was responsible for all outby activities, including rock dusting, belt shoveling, and supply hauling. Tr. at 72.

not see any loose coal or float dust in the tail roller. Tr. at 85-86. Hendricks testified that, after the citation was issued, he discussed his objections with Miller, who was primarily concerned with the accumulation at the dump point, and that Miller did not mention any issue with the tail roller turning in accumulations. Tr. at 86-87.

Hendricks also testified that there were production delays during the shift, but the only cleaning-related delay was to address the feeder dump and tailpiece cited by Miller. Tr. at 83-84; *see also* R. Ex. 1. Hendricks further testified that four feet of coal accumulations typically would not be present immediately after routine cleaning, which normally occurred between three and six times per shift. Tr. at 82, 91.

Roy Shavez, mine foreman with twelve years of experience in the mining industry, testified that he was the face boss in charge of the cited area during the prior shift (morning shift), which ended about 4:00 p.m.. Tr. at 93.[6] Shavez testified that his crew scooped the feeder, shoveled coal from the tailpiece, and rock dusted the area about thirty to forty minutes before the end of their shift. Tr. at 94. Shavez noted that the production report did not normally note when the scoop was utilized to clean the feeder. Tr. at 95.

According to Shavez, during the afternoon shift, one continuous miner ran on one side of the section, while the miner on the other side experienced delays. Tr. at 96; R. Ex. 1. During the production delays caused by the inoperative miner, more coal was loaded onto the feeder from one side of the section than the other. Tr. at 96. Shavez speculated that unless caution was exercised, the coal being dumped on the more productive side would push over to the other side of the feeder because less coal was being dumped on the opposite side to push back. Tr. at 97.

Shavez also testified about the typical cleaning process that he used at the feeder. Shavez acknowledged that foremen had autonomy to establish the method and frequency of cleaning around the feeder because Respondent did not have a uniform cleaning policy. Tr. at 98. Shavez testified that a miner would examine the area periodically throughout the shift and clean up any spillage. Tr. 99-100. Foreman Shavez would check behind the miner who was responsible for shoveling the feeder area to make sure that the area was clean. *Id*.

Chad Barras, Peabody Midwest Safety Director, testified that a fire was not reasonably likely to start at the cited area, and even if a fire were to start, it would not be reasonably likely to result in an injury. Tr. at 112.[7] Barras testified that the only fatalities known to have resulted from a belt fire since 1980 were the result of the tragedy at the Aracoma Mine in 2006. Tr. at

[6] Shavez was not the foreman on Unit 1 at the time of the citation, and he was not present during Miller's inspection. Tr. at 99, 102. Tommy Brown, the foreman in charge of the area, had passed away prior to the hearing. Tr. at 77.

[7] As Peabody Midwest's Safety Director, Barras was in charge of reviewing the safety processes of all Peabody affiliated mines in the region, including Willow Lake Portal. Tr. at 103-04. Although very familiar with the operations at the mine, Barras did not accompany Miller and Hendricks during the inspection, and thus has no first-hand knowledge of the alleged hazardous conditions. Tr. at 115.

107. In support of his assertions, Barras cited the Bentley report, which states that between 1980 and 2005, there were sixty-three reportable fires in belt entries and no fatalities or lost-time injuries. Tr. at 108-09; R. Ex. 3.[8] Barras further testified that the fatalities at Aracoma were attributable to legion safety failures, including disabled fire suppression, non-functioning carbon monoxide alarms, and a significant delay in warning underground miners once the fire was detected on the surface. Tr. at 106-07.

Barras testified that there has not been a single reportable belt fire at Willow Lake Portal, and only one non-reportable fire in a belt entry. Tr. 117-18, 119. According to Barras, the close proximity of the tail roller to carbon monoxide monitors and miners meant that if the coal accumulations started to burn, the smoke would be detected quickly by monitors or by olfactory perception of miners working nearby. Tr. at 110-11. Barras further testified that once a fire was so detected, it would be addressed by the mine's fire brigades. *Id*.

B. Disposition

1. Violation of 30 C.F.R. § 75.400

a. Relevant Legal Principles

30 C.F.R. § 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Section 75.400 prohibits accumulations, not mere spillages. *See Old Ben Coal Co. (Old Ben II)*, 2 FMSHRC 2806, 2808 (Oct. 1980). The Commission stated in *Old Ben* that "we accept that some spillage of combustible materials may be inevitable in mining operations. No bright line differentiates the two terms. Whether a spillage constitutes an accumulation under [30 C.F.R § 75.400] is a question, at least in part, of size and amount." *Id*. An accumulation exists if "a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co*., 12 FMSHRC 965, 968 (1990), *aff'd, Utah Power & Light Co. v. Sec'y of Labor*, 951 F.2d 292 (10th Cir. 1991); *see also Old Ben II*, *supra*, 2 FMSHRC at 2808 ("[T]hose masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe."); *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012).

[8] At the time of the hearing, Terry Bentley was the Chief of Health and Safety at MSHA. His 2007 presentation is titled "Reducing Belt Entry Fires in Underground Coal Mines." Tr. at 107. It is commonly referred to as the Bentley report. The report's data predates the events at Aracoma. Tr. at 116.

The Commission has expressly rejected the argument that "accumulations of combustible materials may be tolerated for a 'reasonable time.'" *Old Ben Coal Co*. (*Old Ben I*), 1 FMSHRC 1954, 1957–58 (Dec. 1979); *see also Utah Power*, *supra*, 12 FMSHRC at 968 (section 75.400 "'was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated'") (quoting *Old Ben I*, 1 FMSHRC at 1957); *Black Beauty*, *supra*, 703 F.3d at 558-59; *Big Ridge*, 35 FMSHRC ___, slip op. at 13, No. LAKE 2009-377 et al. (June 4, 2013). The Tenth Circuit in *Utah Power and Light* similarly stated that "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power & Light*, *supra*, 951 F.2d at 295, n. 11.

b. Application of the Law

I find that Respondent violated section 75.400 because there were accumulations, not spillage. Miller measured the loose coal at the feeder and tail roller to be fifty feet in length and the float dust to be twenty-five feet in length. On cross, Miller explained that the fifty feet of accumulations described in the citation referred only to the loose coal, and that the seventy-five feet noted in the citation also included the float dust. Further, four feet of coal was present on the corner right side of the feeder and accumulations that were thirty-nine inches deep were present on the other side. In addition, accumulations six to eighteen inches deep were present under the tail area. Moreover, the accumulations were present around the feeder and tail piece for so long that coal was packed around the tail roller, which was pulverizing the coal and suspending black float dust into the air.

A reasonably prudent person familiar with the mining industry and the protective purpose of section 75.400 would have recognized that the extensive size and amount of float coal dust and loose coal at the tail roller and feeder were accumulations and not mere spillage. Therefore, I find a violation of section 75.400.

2. S&S

a. Relevant Legal Principles

The Mine Act defines an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the Commission's subsequent *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a

reasonably serious nature. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, supra,* 52 F.3d at 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury is made assuming continued normal mining operations. *U.S. Steel Mining Co. (U.S. Steel III),* 7 FMSHRC 1125, 1130 (Aug. 1985) (*quoting U.S. Steel Mining Co. (U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984).

In examining the third element of the *Mathies* test for those violations that involve hazards of ignition or fire, the Commission has held that the Secretary must prove that such a hazard is reasonably likely to occur, in addition to proving that the hazard is reasonably likely to result in an injury. *Ziegler Coal Co.*, 15 FMSHRC 949, 953 (June 1993). In *Ziegler Coal*, the Commission found that a fire or explosion hazard that is reasonably likely to occur is a necessary pre-condition to finding that an injury is reasonably likely to occur. *Id*., *citing U.S. Steel Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984). *U.S. Steel IV*, *supra*, 18 FMSHRC at 867, *quoting Ozark-Mahoning Co*., 8 FMSHRC 190, 192 (Feb. 1986).

At the same time, the Commission has long held that "[t]he fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative.'" *U.S. Steel IV*, *supra*, 18 FMSHRC at 867, *quoting Ozark-Mahoning Co*., 8 FMSHRC 190, 192 (Feb. 1986); *see also Elk Run Coal Co*., 27 FMSHRC 899, 906-07 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996); *Amax Coal Co.*, 19 FMSHRC 856, 849 (May 1997), *citing New Warwick Mining Co.*, 18 FMSHRC 1568, 1576 (Sept. 1996); *McElroy Coal Co.*, 30 FMSHRC 237, 247 (Mar. 2008) (ALJ) ("While [the Bentley] . . . report [has] concluded there had been no reportable lost time injuries as a result of belt fires through 2005, it cannot be seriously contended that the report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine."); *Big Ridge, Inc.*, 32 FMSHRC 1020, 1024 (Aug. 2010) (ALJ) ("I do not however agree that the [Bentley] report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine.").

The Commission has provided the following S&S guidance for accumulation violations:

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co*., 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 5 FMSHRC 5, 9 (Jan. 1997).

Finally, the Commission and courts have held that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan*

Cumberland Coal Co., 20 FMSHRC 1275, 1278-79 (1998); *Buck Creek Coal, Inc*., *v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

b. Application of the Law

I find that the Secretary has established that the violation is S&S. I have found a violation of section 75.400 above. The Secretary has also satisfied the second prong of *Mathies* because the violation contributed to a discrete fire hazard. Furthermore, the Secretary has met the third *Mathies* element because there was a danger of a belt fire caused by the ignition of accumulations grinding against the tail roller, and the fire was reasonably likely to cause an injury. Specifically, the accumulations were extensive and an ignition source was present. Miller testified that there were six to eighteen inches of loose coal "coned" around the tail roller. Tr. at 37. Given sufficient friction between conveyor belts, loose coal, and coal dust, coal would be heated to ignition. Tr. at 48.

I discount the effort of Respondent's witnesses to rebut Miller's account of the conditions. On direct, Hendricks testified that he did not recall whether there was coal that was being ground up at the tail roller. He did not recall one way or the other. Tr. 76. On cross, however, Hendricks testified that he did not see any loose coal and coal dust in the tail roller. Tr. 85-86. I credit Miller's testimony that the coal accumulations were grinding in the tail roller, over Hendrick's inconsistent recollection. Furthermore, while Hendricks testified that the position of the feeder and padding on the rim of the feeder would prevent coal from accumulating at the tail roller, these preventive measures do not appear to have been enough to stop the accumulations that Miller observed. *See* Tr. 76, 85. I place little weight on Barras' opinion that a fire was not reasonably likely to occur. Unlike the experienced inspector, Barras was not present during the inspection and did not observe the conditions at the tail roller and feeder.

In addition, the fact that there has not been a single reportable belt fire at Willow Lake does not preclude an S&S finding. Tr. at 202-03. The absence of an injury-producing event when a cited practice has occurred is not dispositive of whether a violation is S&S. *See Amax, supra*, 19 FMSHRC at 849; *Elk Run Coal*, *supra*, 27 FMSHRC at 906; *Blue Bayou Sand & Gravel*, *supra*, 18 FMSHRC at 857. For the same reason, I give little weight to the Bentley Report (R. Ex. 3), which states that between 1980 and 2005, there were sixty-three reportable fires in belt entries and no fatalities or lost time injuries. *See Big Ridge, Inc., supra*, 35 FMSHRC ___, slip op. at 5; *citing Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007, 2011-12 (Dec. 1987) (rejecting use of Bentley Report and noting that "[i]t would have been inappropriate for the Judge to draw broad conclusions about the likelihood of injury from belt fires from the presentation, when the presentation was prepared for a different reason and had a different focus.").

Furthermore, applying existing Commission and Seventh Circuit precedent, I decline to give probative value to Respondent's testimony that it utilizes a number of early fire detection and response systems on its belt line, including methane and carbon monoxide detectors, water sprays, and ventilation control devices. In *Buck Creek*, the Seventh Circuit affirmed a judge's determination that a coal accumulation violation on a conveyor belt was S&S, despite the

presence of redundant fire detection and prevention measures. 52 F.3d at 136. Thereafter, applying *Buck Creek*, the Commission has determined that little weight should be given to safety measures such as fire detection and suppression systems when determining whether an accumulation violation is S&S. *Amax Coal*, *supra*, 18 FMSHRC at 1359 n.8; s*ee also Amax Coal*, *supra*, 19 FMSHRC at 850 (holding that the presence of fire detection or fire-fighting equipment does not negate the serious safety risk posed by mine fires).

The Commission recently reaffirmed its prior rulings in *Big Ridge, Inc.*, *supra*, 35 FMSHRC ___, slip op. at 4. It reasoned that adopting the argument that mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before an S&S finding could be made. *Id*. The Commission has held that "such an approach directly contravenes the safety goals of the Act." *Cumberland Coal*, 33 FMSHRC 2357, 2369-70 (Oct. 2011).

In *Cumberland Coal Resources v. FMSHRC*, the D.C. Circuit recently concurred with the Commission's approach:

> [T]he "focus of the significant and substantial inquiry is the nature of the violation. By focusing the decisionmaker's attention on 'such violation' and its 'nature,' 'Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards.' Because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry."

717 F.3d 1020, 1029 (D.C. Cir. 2013). In any event, I further note that Respondent's early detection systems had a history of problems with false or inoperative alarms. Tr. at 40.

Respondent also argues that the coal was damp and that a fire was unlikely to occur. The Commission, however, has held that the existence of wet areas where accumulations have occurred does not minimize or prevent the propagation of a fire for S&S purposes. *See Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May, 1990) ("The fact that some of the coal accumulations were damp. . . [is] not determinative [for S&S] because, as noted above, damp coal dries in the presence of fire.").

The Secretary has also satisfied the fourth element of *Mathies* because a fire was reasonably likely to result in serious injuries. Miller testified that miners were likely to experience injuries that would have resulted in lost workdays or restricted duty. He further testified that the injuries may occur in the form of "smoke inhalation" or "falling in smoke" and "breaking an arm." Tr. at 40. Accordingly, I conclude that a fire was reasonably likely to result in serious injuries.

In sum, I conclude that the violation is S&S. The Secretary has established an accumulation violation that contributes to a discrete safety hazard, satisfying the first and second prongs of *Mathies*. Moreover, during continued normal mining operations, the violation was reasonably likely to cause a mine fire, which would produce serious injuries, meeting the third

and fourth elements of *Mathies*. Accordingly, I affirm the S&S designation for Citation No. 6679907.

3. Negligence

a. Legal Principles

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, *inter alia*, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required . . . to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.; see also* 30 C.F.R. § 100.3(d), Table X.

b. Application of the Law

I find that the Secretary has established that the violation resulted from Respondent's "moderate" negligence. Some facts mitigate against a finding of high negligence. While Miller testified that the black color of the float dust demonstrated that the accumulations were present for a while and at least for more than one shift, he also conceded that the bulk of the accumulations could have occurred in less time if a miner had inadvertently dumped coal in the wrong place. Tr. at 47. I find that such a scenario is more likely given Shavez's uncontroverted testimony that it was his practice to ensure that the area was scooped and dusted prior to the end of his shift, which was immediately prior to the shift during which the citation was issued. Tr. at 94. I also find that the production delays during the afternoon shift make it less likely that the accumulations were the result of gradual spillage as the mine was not running coal for over half of the shift. *See* R. Ex. 1 (showing that coal was produced for 226 minutes of the 545 minutes that miners were working the face).

Accordingly, I find that Citation No. 6679907 should be modified from "high" to "moderate" negligence to reflect the fact that the condition did not last for several shifts, as the Secretary contended, and that the area was scooped and rock dusted by Chavez's crew at the end of the prior shift.

V. Citation No. 6683969

A. Findings of Fact

On January 29, 2009, MSHA coal mine inspector, Larry Morris,[9] conducted an E01 inspection of the feeder for Unit 2. He issued a 104(a) citation alleging a violation of 30 C.F.R. § 75.400 because oil and oil-saturated coal had accumulated in the tray inside the oil tank compartment. The citation states:

> An accumulation of combustible materials, in the form of oil and oil saturated coal fines and loose coal, is present on the Unit #2 (MMU002) working section feeder. The accumulations are present in and around the oil tank and in the oil filter compartment and range from a film of oil to approximately 2 inches of oil saturated coal fines and loose coal.

P. Ex. 29A.

Respondent's internal examination records show that there was an oil leak at the feeder on January 25, 2009, four days before Morris issued the citation. There was no indication in the records that Respondent cleaned the feeder. P. Ex. 32A; Tr. at 151. Morris determined that coal dust and loose coal saturated the oil because the ram and shuttle cars were dumping coal into the feeder faster than the feeder could take it out, which caused an overflow of loose coal and dust to settle in the oil. Tr. at 134. Morris was unable to specify the amount of coal in the oil. Tr. at 134.

Five minutes prior to issuing the citation, Morris issued 104(d)(2) Order No. 6683968 for a separate violation along the same conveyor belt because the tail piece was running in coal, which created a frictional ignition source.[10] Tr. at 135-36. Morris opined that any fire resulting

[9] Morris has been a coal mine inspector and accident investigator for MSHA for about five years. During that time, he conducted underground regular and spot inspections, and investigated roof falls, accidents, and fatalities. He has also inspected surface mines and mine construction sites. Morris has been in the coal industry for thirty-seven years. Tr. at 128-29. Prior to working for MSHA, Morris worked as a coal miner in such positions as laborer, conveyor belt foreman, general underground foreman, section foreman, longwall foreman, conveyor belt coordinator, and assistant mine foreman. Morris is familiar with Willow Lake Portal and has performed numerous inspections there. Tr. at 130.

[10] Morris testified that Order No. 6683968 was issued for a hazardous condition because "the rotating tail . . . roller of the belt and the conveyor belt itself were actually turning in loose coal and coal fines . . . up to 18 inches deep, and around the tail roller itself it was dry and the . . . accumulations were so great that the self-cleaning roller could not throw it out fast enough and it actually built up. . . [and] pushed the belt two feet . . . away from the tail pulley and it was getting . . . close to . . .the metal of . . . the tail piece." Tr. at 136. In a prior case, Judge Melick

from the friction at the tail roller would spread to the oil saturated coal in the feeder tray. Tr. at 137. He determined that the foreman had repeatedly shoveled away coal from the tailpiece that morning, but failed to clean the tray. Tr. at 162-63.

At hearing, Morris used a diagram of a feeder and tail piece to illustrate the proximity of the accumulations to the frictional ignition source. *See* P. Ex. 35A. Although the photographs of the feeder are not the same feeder as the one in question, Morris testified that they represented a "typical tail piece feeder setup." Tr. at 159. Respondent's witness, Brad Champley, the production foreman for the section, agreed that the feeder in the diagram was similar to the feeder that was present on January 29, 2009. Tr. 179.

On the diagram, Morris marked the location of the ignition source at the tail pulley with two "Xs," one red and one blue, and noted that the accumulations at the tray were located diagonally at the bottom of two circles, both red and blue, marked "TRAY." P. Ex. 35A. Based on the diagram, Morris testified that the ignition source was "within one to two feet" of the feeder tray where the accumulations were located. Tr. at 136-38.

Upon examining the Secretary's photographs, Champley and Barras testified that the picture of the entire tray and tail roller encompassed about ten feet. Tr. at 183. 190. Barras based his opinion on "the thickness of the radiator" and "the dimensions of the filters and . . . where the boom comes into play." Tr. at 189-90. Champley testified that the area marked with the red and blue circled "X" did not represent the ignition source, but rather the feeder. Champley further testified that the ignition source was behind a chain in the distance. He marked the location with a circle and a blue letter "A" on the right hand side of the diagram. Tr. at 179; P. Ex. 35A.[11]

Morris determined that a fire resulting from the accumulations was reasonably likely to occur and spread, injuring ten miners in the area. Tr. at 143-44. Although air was generally moving outby the tail piece, Morris testified that the gaps in the outby curtain, which allowed the conveyor to run through, would also allow some air to move inby towards the feeder. Tr. at 143. Thus, Morris determined that if a fire started at the tail piece, the air traveling through the curtain's holes would cause some movement towards the accumulations at the feeder tray. Tr. at 143. Morris testified that oil-soaked coal is more likely to catch fire than solid or loose coal, or coal fines that are not oil saturated. Tr. at 143. Morris did not know the ignition temperature or flashpoint of the oil or coal accumulations in the feeder tray. Tr. at 167.

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found that Order No. 6683968 constituted an S&S violation. At hearing for the instant citation, Judge Melick took judicial notice of the S&S designation and the ignition source at the tailpiece for Order No. 6683968. Tr. at 134-36. On appeal, the Commission affirmed Order No. 6683968 as S&S. *Big Ridge, Inc*., supra, 35 FMSHRC ___, slip op. at 15.

[11] The oil tank in the feeder was not shown in the diagram. Rather, it was located off to the top left of the diagram. The boom from the feeder, which placed coal on the conveyor belt, was located off to the right side of the diagram.

There were various safety mechanisms in the feeder, including a guard over the motor, a cooling fan behind the motor, and an automatic shut-off when the feeder approached a certain temperature. On cross examination, Morris testified that he did not check whether the safety mechanisms were operational. Tr. at 161.

Morris testified that the violation was obvious because the miners working near the tail piece could see the feeder tray, which was in the same area as the tail piece. Tr. at 144. The miners had cleaned the tail piece three times that shift before Morris issued the citation. *Id*. Furthermore, the mine foreman cleaned out the gob in the tail piece during an on-shift examination before Morris issued the citation. Tr. at 154-55. Nevertheless, Morris determined that no one had bothered to clean up the accumulations in the feeder tray. Morris testified that the foreman should have seen the accumulations in the nearby tray. *Id*.

Morris concluded that the dirty appearance of the oil-saturated coal indicated that the accumulations were present for over three shifts. Tr. at 150. Morris further testified that Respondent's examination reports demonstrated that the accumulations persisted for four days. In this regard, the report for January 25, 2009 states that the 603 feeder had an oil leak and the fittings were replaced. P. Ex. 32A; Tr. at 146. The entry did not mention any cleaning of oil-saturated coal in the tray.

Morris opined that if the accumulations had been cleaned up, Respondent would have recorded the action of "washed" in the reports. Tr. at 149, 151. For example, on page 1 of P. Ex. 32A, Respondent described car 879 as "needed washed" and recorded "washed" for the action taken. Moreover, Page 2 of the report shows that Respondent described the #66 unit sub as "dirty" and marked the "action taken" column as "cleaned." By contrast, Champley testified that the feeder was typically washed every shift, and it was not typical to record a feeder as washed in a production report because feeders are not normally shut down while being washed. Tr. at 179.

Morris also testified that Respondent had a past history involving several prior violations of 75.400. Tr. at 156. He did not analyze, however, whether those 75.400 violations were the result of accumulations on a feeder, oil tank, or oil filter compartment. Tr. at 169.

The record shows that various safety mechanisms were present at the feeder, which would reduce the effects of any fire. Morris acknowledged that the feeder's fire suppression system was operational when Morris issued the citation. Tr. at 163. In addition, Morris testified that carbon monoxide sensing equipment was present along the belt to detect a fire. *Id*. Further, Morris testified that the feeder tray had a lip on it that was about two to two-and-a-half inches above the height of the accumulations within the tray, and a chain, cable, and water hose were present between the feeder and the tray. Tr. at 164-65. Also, Barras testified that people working in the area would have been able to smell a fire before it spread. Tr. at 190-93.

Champley testified that it was unlikely that a fire would occur because the mine mechanic "would normally wash the feeder . . . every shift," and "[h]e. . . did it on his own." Champley also testified that during the inspection, Morris did not raise any significant concern about any oil-saturated coal or other accumulation at the feeder, and Morris seemed a lot more concerned about the frictional source of ignition at the tail roller. Tr. at 177-79. Champley further testified

that while he was shoveling the tailpiece that morning, he did not notice any accumulations of oil-saturated coal around the oil tank or in the oil filter compartment, nor did Morris point such accumulations out to him during the inspection. Tr. at 179. In addition, Champley testified that the miners were located to the far right side of the feeder when shoveling, and the chain, hose, and water cable were located between the miners and the feeder tray. Tr. at 176-86; P. Ex. 35A.

Morris determined the violation to be S&S and designated the gravity of the violation as "reasonably likely" to result in "lost workdays or restricted duty" to ten people. He designated Respondent's negligence as "high." P. Ex. 29A. Morris testified that Respondent did not offer any mitigating circumstances at the time of inspection. Tr. at 156.

B. Disposition

1. S&S

I find that the Secretary has established that the violation was S&S. Respondent concedes that a violation of section 75.400 occurred as a result of the accumulations of oil and oil-saturated coal fines and loose coal in the Unit #2 working section feeder. The Secretary has also satisfied the second element of *Mathies* because the cited condition exposed miners to an identifiable and discrete safety hazard, i.e., a propagation hazard for a fire from the friction caused by the accumulations at the tail roller. In addition, the Secretary has met the third element of *Mathies* because the propagation hazard contributed to by the violation was reasonably likely to result in and enhance injury from the fire. The Commission has affirmed Judge Melick's determination that the accumulations at the tail roller were reasonably likely to contribute to a fire hazard.

Morris testified that the accumulations were only two feet away from the tail roller. Tr. at 165. While Barras and Champley testified that the oil tank and the tail roller were separated by about ten feet, Morris indicated that the tray containing the oil saturated coal fines was not only under the oil tank, but extended the greater part of the length of the feeder. Tr. at 142; P. Ex. 35A (Morris marked the location of the tray with blue arrows). Even Barras conceded that the feeder was only three to four feet away from the tail roller. Tr. at 190. Given the proximity of the accumulations to the tail roller and the direction of the air flow, I find it reasonably likely that the accumulations of oil and oil-saturated coal fines would propagate any fire ignited by the hazardous conditions cited in Order No. 6683968.

I decline to give probative weight to Respondent's testimony that a cooling fan was present between the tail roller and the oil tank of the feeder. Nor do I give weight to Respondent's argument that an automatic shutoff valve would have de-activated the feeder when it reached a certain temperature. In *Buck Creek,* the Seventh Circuit declined to give weight to evidence of flame resistant belts, which are preventative safety measures. *Buck Creek, supra*, 52 F.3d at 135-36. By analogy, I decline to give probative weight to Respondent's evidence that the cooling fan and shutoff valve were preventative measures. I also do not give probative weight to Respondent's evidence that the mine's fire detection and suppression systems would have minimized the likelihood of any injuries. *See* Tr. at 161.

Finally, I cannot assume that Respondent would have cleaned the feeder before a fire occurred simply because Respondent had cleaned the feeder in the past. *Big Ridge, supra*, 35 FMSHRC ___, slip op. at 14-15. Without more concrete evidence regarding some sort of internal policy, schedule, or rule obliging employees to clean the feeder on a regular basis, I decline to assume that Respondent would have abated the condition during continued normal mining operations. Finding otherwise would open the door for mine operators to avoid virtually any S&S designation by claiming that they would have abated the violation, merely because they have done so in the past.

I conclude that the accumulations in the feeder tray presented a propagation hazard in the likely event of a fire, and the propagation hazard contributed to by the violation was reasonably likely to result in or enhance serious injury from a fire originating from the ignition hazard. *Cf.*, *Mid-Continent Res., Inc*., 16 FMSHRC 1226, 1231 (June, 1994) (finding a propagation hazard as a partial basis for affirming an S&S designation). Accordingly, I affirm the S&S designation for Citation No. 6683969.

2. Negligence

I conclude that the Secretary has established that the violation resulted from Respondent's "high" negligence. The January 25, 2009 report describing the oil leak at the feeder suggests that a problem existed for four days and that Respondent should have known about it. P. Ex. 32A. Furthermore, the feeder tray set-up in the diagram was only two-and-a-half inches high and the accumulations had risen two inches in the open metal tray. Tr. at 133, 141. Thus, the accumulations were obvious because they were only half an inch from the top of the rim of the tray.

The fact that Morris focused his attention during the inspection primarily on the friction at the tail roller is immaterial, as the duty to comply with the Mine Act falls on the mine operator. The pre- and on-shift reports establish that Respondent did not take the opportunity to identify and correct the violation for three shifts, despite being alerted to a problem. P. Ex. 34A. Furthermore, Respondent did not take reasonable efforts to abate the violation prior to the issuance of the Citation. Although Respondent replaced the fittings, it failed to clean up the accumulations of oil-saturated coal. Finally, as with the prior violation, Respondent's history of section 75.400 violations and MSHA's warnings placed Respondent on notice regarding continuing accumulation problems. Having rejected Respondent's arguments regarding potential mitigating circumstances, I find that Citation No. 6683969 resulted from Respondent's high negligence.

VI. Citation No. 6667482

A. Findings of Fact

On November 24, 2007, MSHA coal mine inspector, Keith Roberts,[12] conducted an E01 inspection of the working section of Unit No. 3. Bart Schiff, Respondent's safety manager, accompanied Roberts. Roberts issued 104(d)(1) Citation No. 6667482 alleging a violation of 30 C.F.R. § 75.400 for accumulations of hydraulic oil, oil-saturated coal, oil saturated coal dust, and oil-saturated rock dust in the main controller and pump motor compartments of the No. 516 coal scoop. P. Ex. 1; Tr. at 276. The Citation states:

> Accumulations of combustible material have been permitted to accumulate along and in the approximate 3' L x 8' W frame that houses the main electrical controller, pump motor and operator's compartment of the Long Airdox battery powered coal scoop, Co. No. 516, located on MMU 003. Combustible material in the form of oil, oil-saturated coal, oil-saturated coal dust and oil-saturated rock dust, ranging in depth from approximately ¾" to an approximate 2" is present along the frame and compartment housing the main controller.
>
> Also, combustible oil, oil-saturated coal and oil-saturated coal dust, ranging in depth from approximately ¾" to an approximate 2 ½" is present along the frame and compartment housing the pump motor. A film of oil-saturated dust is present on the hoses and the electrical cables running from the main controller to the pump motor and electrical power take off (PTO) unit.
>
> Additionally, combustible oil, oil-saturated coal, oil-saturated coal dust and oil-saturated rock dust, approximately ¾" in depth is present on the floor of the operator's compartment.
>
> Two ignition sources for the combustible material are present on the machine. The main controller has an opening in excess of .008 inch along the flame path at the top right corner of the enclosure and the electrical cable serving the electrical power take off (PTO) unit is in contact with and fouling against the rotating drive shaft running through the pump motor compartment.

P. Ex. 1.

Roberts designated the gravity of the violation as "reasonably likely" to result in "lost workdays or restricted duty" to one person, and thus S&S. He designated

[12] Roberts began working in the coal mining industry in 1972. Tr. at 275. While in the private sector, Roberts held several labor and management positions, including equipment operator, section foreman, face boss training instructor, and safety engineer. *Id*. Roberts has been with MSHA since 1999. He has held various positions concerning underground coal mines, including work as an inspector, investigator, and ventilation and roof control specialist. Tr. at 273-74.

Respondent's negligence as "high." P. Ex. 1. He further designated the violation as an unwarrantable failure.

On the date of the inspection, the battery-operated coal scoop was located in a working section that was temporarily idled due to a damaged conveyor belt. Tr. at 277. Roberts and Schiff gave conflicting testimony regarding whether the scoop was energized at the time of the inspection. Tr. at 345; 364; *see also* P. Ex. 9. When the section had been operational, Roberts testified that the scoop would have been primarily used to pick up coal fines that are left behind during the production cycle, and transport them to the feeder. Tr. at 278-79.

Roberts had Respondent remove several covers to access the inner-workings of the scoop. Tr. at 294. Roberts testified that operators are required to perform an examination of the scoop's inner-workings once a week, and that such a task usually took a team of three miners (a mechanic and two others) a few minutes to remove the bolts, which held the covers in place. *Id*. Once the covers were removed, Roberts observed oil saturated coal and coal dust in the main controller, the pump motor compartment, and the operator's compartment. Tr. at 290, 280. Roberts, however, did not observe any oil leaks. Tr. at 363.

In preparation for hearing, Roberts drew a crude sketch of a coal scoop that illustrated the approximate locations of the alleged accumulations in the various sections of the scoop. Tr. at 280-81; P. Ex. 37. The sketch was not drawn to scale and Roberts was unsure if the picture reflected the same scoop model that was cited. Tr. at 280-83. Referring to his illustration, Roberts testified that the scoop was made-up of three distinct segments: the front bucket and two main segments of the body. Tr. at 281-82. The front section of the body contained the operator's compartment, the main controller, the pump motor compartment, the electric power takeoff unit, and the drive shaft. *Id*. The back section of the body contained the batteries and one or two tram motors. *Id*.

Roberts used diagonal lines and red ink to indicate the general locations where he observed accumulations of coal fines and oil. Tr. at 285; *see* P. Exs. 37-39. The alleged accumulations were confined to three locations in the front section of the body: the operator's compartment, the main controller compartment, and the pump motor compartment.

1. The Operator's Compartment

Roberts testified that a ¾- inch-deep accumulation of oil saturated coal and coal dust was found on the floor of the operator's compartment. Tr. at 292-93. The operator compartment is where the operator sits and includes a tram pedal, much like a gas pedal on a car or truck, as well as other operating mechanisms. Tr. at 283; P. Br. at 17. Roberts did not claim that an ignition source was located near the operator's compartment accumulation. Rather, the accumulation presented a propagation hazard if a fire were to ignite in an adjoining section of the scoop. Tr. at 308.

Schiff did not take notice of the material on the floor of the operator's compartment. Tr. at 364. He testified that it was normal to see a mixture of mud, dirt, and coal on the floor because such material is often tracked in on the operator's boots. Tr. at 364-65. Schiff testified

that he was able to see the extent of the accumulations only after the panels in the operator's compartment were removed,. Tr. at 365-66, 369. Similarly, Schiff testified that oil was not visible until the panels on the operator's compartment were removed. Tr. at 369.

2. The Main Controller Compartment

Roberts testified that the main controller, which housed the scoop's electrical operating components, had experienced a buildup of ¾ to 2 inches of oil-saturated coal and rock dust along the frame of the protective cover. Tr. at 282, 290, 293. Roberts alleged that an impermissible gap of more than .008 of an inch in the main controller cover would allow the electrical components to ignite methane in the air. Tr. at 312; P. Ex. 3.[13] In such a scenario, Roberts determined that the accumulations of oil and coal dust presented a propagation hazard. *Id*. Alternatively, Roberts alleged that sustained arching or sparking could travel out through the small gap and ignite the accumulations on the outside of the protective cover. *Id*. Roberts explained that the cover needed to be sufficiently flush against the compartment to be an effective barrier to fire. Tr. at 282, 311-12.

Schiff testified that the oil-fill area was behind the main panel, and that when the oil tank was overfilled, the overflow would run down over the main controller panel. Tr. at 366-67. Even with the covers on, Schiff was able to see that some oil had run over the tank. *Id*. According to Schiff, if oil or accumulations are observed, the scoop should be washed. *Id*.

Roberts acknowledged that he found no methane at the scoop during the inspection. Tr. at 345. Although during normal operations the scoop would be required to travel throughout the working section, no evidence of elevated methane levels in the working section was adduced at hearing. Roberts also admitted that the electrical components on the main controller were in a metal and permissible structure, which was separate from the compartment with the accumulations. Tr. at 341; P. Ex. 38-39. Roberts further acknowledged that the scoop was equipped with an emergency stop switch and a fire suppression system, which could be activated from the operator's compartment. Tr. at 337-38.

3. The Pump Motor Compartment

In the pump motor compartment, Roberts observed between ¾ and 2 ½ inches of combustible material on the frame, and a film of oil-saturated dust on the hoses and electrical wires inside the compartment. Tr. at 293. Directly below the pump motor compartment is the vehicle's drive shaft. Tr. at 352-53. Roberts testified that there was not a protective cover between the drive shaft and the pump motor compartment. *Id*.

[13] Roberts issued an additional S&S citation, Citation No. 6667489, for the impermissible opening in the cover to the main controller. Tr. at 309; P. Ex. 3. As Respondent had not contested that citation, Judge Melick instructed the parties not to retry that final citation. Accordingly, Robert's testimony on the subject was limited. Tr. at 311.

After removing the foot petal cover, Roberts and Schiff noticed that a 128-volt electrical cable had become loose in the area around the pump motor compartment and was "drooping down." Tr. at 367-68; *see also* P. Ex. 9. While the cable had no discernible damage, Roberts noticed that a portion of the cable was cleaner that the surrounding area and surmised that this was due to the cable touching the rotating drive shaft. Tr. at 299. Roberts testified that, assuming continued, normal mining operations, friction with the drive shaft would eventually eat away at the cable jacket and expose the inner electrical components. *Id.*[14] Roberts determined that a damaged cable would be reasonably likely to cause electrical sparks and arcing capable of igniting the oil and coal dust in the pump motor compartment directly above, and that the resulting fire would easily spread to other areas of the scoop. Tr. at 302. Roberts, however, admitted that he did not know the ignition temperature or flashpoint of the coal or hydraulic oil. Tr. at 336-37.

Roberts acknowledged that the cable had an additional conduit around it for protection. Tr. at 389-90. He also acknowledged the existence of a circuit breaker to provide protection if the cable became fouled with the drive shaft. Roberts testified that a circuit breaker would shut down the scoop, which would prevent any arcing or sparking. Tr. at 391-93. Roberts testified, however, that "there has been a very long history of circuit breakers that have failed under tests and had to have been replaced." Tr. at 304. Although Roberts did not perform a complete check of the scoop's circuit breaker during the inspection, he cited a specific example of a prior failure in September 2007, which involved a fire on a coal scoop where trip settings had been set above acceptable levels. Tr. at 304-05, 406.

Respondent's witness Melvin acknowledged that circuit breakers do fail, but declined to describe the failures as "regular" or occurring "every day." Tr. at 391.

4. Examination Records

Roberts reviewed the examination records for the coal scoop before issuing the Citation. P. Ex. 1. On direct, he testified:

> [W]hat's significant to me is that on [November 17, 2007], Scoop 516 was examined, and in the dangerous conditions it has 'needs washed,' which is the same as saying that there's combustible material that needs to be removed from the machine. Under the action taken, it really shows no action taken, it simply says that it's been reported.

Tr. at 328.

[14] Roberts had previously observed an instance at the mine where a drive shaft on a coal scoop had worn away the cable jacket on a hydraulic hose. Tr. at 300; P. Ex. 4. Although, the hydraulic hose and electrical cable were made of different materials, they are both intended to be abrasion resistance. Tr. at 396.

Roberts determined that the records established that the scoop was dirty, but not cleaned. Tr. at 328-30; *see also* P. Ex. 5.[15] Roberts determined that Respondent's failure to address a known hazardous condition played a "significant" role in his determination that the citation should be designated as an unwarrantable failure. Tr. at 328.

Daniel Bishop, who works in Respondent's safety department, testified that the scoop was washed on November 20, four days prior to the citation. Tr. at 381. This testimony is corroborated by the section foreman's report for November 20 on Unit No. 3. R. Ex. 7, p. 6. Bishop also testified that he washed two cars on the day that Roberts issued the citation, but did not wash the scoop because it normally did not get dirty enough to wash every day. Tr. at 383. Respondent's operation reports show that Respondent was not washing the scoops on a daily basis. Tr. at 384-85; R. Ex. 7.

B. Disposition

1. S&S

I find that the Secretary has established that the violation is S&S. Respondent concedes that a violation of section 75.400 has occurred. The violation exposed at least one miner to an identifiable and discrete safety hazard, i.e., the danger of a fire from arcing and sparking that would have ignited the oil-saturated coal accumulations in the scoop's main controller and pump motor compartments. I further find that the violation was reasonably likely to cause a fire and resultant injuries as the oil-saturated coal accumulations were reasonably likely to ignite from the arcing and sparking caused by the PTO cable fouling against the drive shaft, under continued normal mining operations.

I decline to find that the mixture of mud and coal on the floor of the operator's compartment contributed to a fire hazard. The small amount of material present "in the area between the pedals and the seat" was likely tracked in on the boots of a scoop operator. *See* Tr. at 336. Such material was likely composed of a mixture of wet coal and inert dirt or rock dust. Tr. at 364-65; 369. As both water and inert material like rock dust are typically used to prevent the ignition of coal, I find that the mud and dirt mixed in with the small amount of accumulations significantly reduced the risk of ignition of the material in the operator's compartment.

I further find that the impermissible gap on the lid to the main controller was unlikely to result in an explosion or to ignite the coal on the main controller frame. Roberts found no methane at the scoop, and although the scoop would travel throughout the working section, the Secretary did not proffer evidence concerning the levels of methane in the rest of the working section. The record supports Respondent's argument that the electrical components on the main

[15] Roberts reasoned that if Respondent had washed the scoop at any time after November 17, Respondent would have recorded such washing like it did for the 871 and 872 cars that appear on page 1 of the examination records with the following notation: "Dangerous Condition: Dirty; Action Taken: Washed." Tr. at 328-30; *see also* R. Ex. 7. Furthermore, Roberts was troubled by the fact that, during the inspection, Respondent did not provide him with any evidence of efforts to wash the scoop. *Id.*

controller were in a separate metal and permissible structure, apart from the compartment cited by the inspector. Tr. 341; P. Ex. 38, 39.

Following Commission and Seventh Circuit precedent in *Buck Creek*, *supra*, 52 F.3d at 135-36, I decline to give probative value to Respondent's testimony that a circuit breaker would have shut down the scoop in the event of any arcing or sparking and subsequent ignition. In *Buck Creek*, the D.C. Circuit declined to give weight to evidence of flame resistant belts, which are preventative measures. *Id.*; MSHA, Regulatory Impact Analysis for Flame Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air From the Belt Entry, Final Rule 5 (Dec. 2008) (describing flame resistant belts as measures used to "prevent conveyor belt fires."). By analogy, I decline to give probative weight to Respondent's evidence of the circuit breaker as a preventative safety measure. Likewise, I decline to give probative weight to Respondent's fire detection and suppression measures, and I emphasize Robert's testimony that the mine has long history of circuit breaker failures. In fact, Roberts cited a specific example involving a fire on a coal scoop. Tr. at 304-05. None of Respondent's witnesses disputed these failures.

In addition, I find that the protective conduit surrounding the PTO cable would have eventually worn away from contact with the drive shaft, given continued, normal mining operations. On cross examination, Melvin admitted that if the PTO cable had continued to run against the moving drive shaft, it would have eroded through the outer jacket into the inner conductors. Tr. at 396-97. This would have resulted in arcing and sparking, thus causing a fire.

Finally, I decline to assume that the scoop operator would have washed the machine before operating it. According to Bishop, the clean-up crews were assigned to wash two cars and one scoop over a six-day rotation. Tr. at 374. Although Respondent washed the feeder four days prior to the citation, I decline to find that Respondent was reasonably likely to wash the scoop before operating it without some sort of concrete example regarding an internal policy schedule or consistent practice obligating miners to do so. As noted, finding otherwise would open the door for mine operators to avoid virtually any S&S designation, merely by claiming that they would have abated the violation. *See Big Ridge, Inc., supra*, 35 FMSHRC ___, slip op. at 12.

Turning to the fourth element of the *Mathies* test, I find that heat or smoke from the fire was reasonably likely to cause "thermal injury" or smoke inhalation and poisoning from fumes emanating from the ignited accumulations or the insulation around the power leads. Tr. at 307. It is reasonably likely that a miner would be operating the scoop at the time of ignition. Furthermore, such thermal and smoke inhalation or smoke poisoning injuries were reasonably likely to be serious. The Commission and its judges have held that smoke inhalation and burns constitute serious injuries for purposes of the fourth prong of *Mathies*. *Amax Coal, supra*, 19 FMSHRC at 847 (upholding judge's finding of S&S based on evidence of smoke inhalation and burns, which constitute serious injuries); *American Coal, supra*, 33 FMSHRC at 2810 (finding smoke inhalation sufficient to support fourth prong of *Mathies*).

Accordingly, I affirm the S&S designation for Citation No. 6667482.

2. Unwarrantable Failure

a. Relevant Legal Principles

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). It refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, supra*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Such factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g., Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). A judge has discretion to determine that some factors are irrelevant or are less important than other factors under the totality-of-circumstances analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Secretary bears the burden of proving all elements of an unwarrantable failure by a preponderance of the evidence. If an operator reasonably, but erroneously, believes in good faith that the cited conduct is the safest method of compliance with the applicable regulation, its actions will not constitute aggravated conduct that exceeds ordinary negligence. *Jim Walter Res., Inc. v. Sec'y of Labor*, 103 F.3d 1020, 1024 (D.C. Cir. 1997).

b. Application of the Law

Having duly considered each unwarrantable failure factor below, I find that the Secretary has failed to establish that the violation resulted from an unwarrantable failure to comply with section 75.400. While the violation was extensive and posed a moderate degree of danger, the condition did not exist for a lengthy period of time in context, and the operator had no knowledge of the hazardous condition. The accumulations were not obvious, absent dismantlement of the equipment, except for a small amount of oil that was visible from the outside. Furthermore, Respondent provided contemporaneous documentation to refute an important part of the inspector's rationale for unwarrantable failure. R. Ex. 7, p. 6. In addition, although on notice of an ongoing problem regarding accumulations, Respondent undertook some reasonable efforts to abate the violation prior to the issuance of the citation.

i. The Extent of the Violative Condition

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal* Co., 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal,* 32 FMSHRC 1189, 1195, *citing Peabody Coal Co*., 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988).

The record establishes that the accumulation violation on the scoop was extensive. The accumulations of coal dust were ¾ to 2 ½ inches deep and existed in several sections of the scoop, including the floor of the operator's compartment, the top of the main controller compartment, and inside the pump motor compartment. Tr. at 292-93. In addition, a large portion of the front body of the scoop was covered in a residue of oil and coal fines. *Id*. The extensiveness factor is somewhat mitigated by the short time it took miners to clean up the accumulations. It took just minutes to remove the covers from the scoop and a single miner could remove the accumulated coal dust and oil by washing the machine. Tr. at 294, 379.

On balance, I find that the extensiveness factor weighs slightly in favor of an unwarrantable failure finding.

ii. The Duration of the Accumulation Violation

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration of cited conditions).

Weekly examination reports state that scoop 516 was in need of washing on November 17 and 19 and that the condition was reported to mine management. P. Ex. 5. Roberts interpreted the report's omission of any action to address the dirty scoop as evidence that the condition lasted for seven days. Tr. at 328. Respondent, however, provided internal production reports showing that the scoop was cleaned on November 20, four days prior to the issuance of the citation. R. Ex. 7. This would indicate that the coal had been accumulating for no more than four days. Respondent was only required to examine the inner-workings of the scoop once per week pursuant to MSHA regulations. 30 C.F.R. §75.512. Accordingly, in this context, I find that a period of up to four days was not a significant length of time, and the duration factor weighs against finding an unwarrantable failure. *See* Tr. at 294, 353.

iii. Whether Respondent Was Placed on Notice that Greater Efforts Were Necessary For Compliance with Section 75.400

Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, *supra*, 31 FMSHRC at 1353-55; *Amax Coal*, *supra*, 19 FMSHRC at 851; *see also Consolidation Coal*, *supra*, 23 FMSHRC at 595. The purpose of evaluating the number of past violations of a particular standard is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . .

problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc*., 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Id.*, *citing Consolidation Coal*, 23 FMSHRC at 595.

The record establishes that Respondent was put on notice that greater efforts were necessary to comply with section 75.400. Respondent had a significant recent and past history of 75.400 violations. Roberts testified that Respondent had received more than forty citations since the start of the inspection, and about 140 to 150 section 75.400 citations were issued in prior year and a half. Tr. at 312-13; *see also* P. Ex. 8 (showing violation history).

As a result of such multiple section 75.400 citations, Roberts discussed the need for greater emphasis on the general cleanup program with mine management and safety personnel. Tr. at 315. Furthermore, Roberts testified that two other inspectors had discussions with Respondent about accumulations on electrical equipment just five days prior to the issuance of the instant citation. Tr. at 315.[16] Thereafter, Roberts provided Respondent with an electrical inspection policy manual, which provided guidance on how to conduct an adequate examination of electrical equipment. Tr. at 324-25.

I find that Respondent was placed on notice that greater efforts were necessary for compliance with Section 75.400, particularly in light of Respondent's prior history of violations and MSHA's warnings regarding Respondent's ongoing 75.400 problems, which specifically included accumulations on electrical equipment. Accordingly, this factor supports an unwarrantable failure finding.

iv. Whether the Violation Posed a High Degree of Danger

The high degree of danger posed by a violation supports an unwarrantable failure finding. *See, e.g., BethEnergy Mines,* Inc., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, *supra*, 10 FMSHRC at 709. For purposes of evaluating whether violative conditions pose a high degree of danger, it is often necessary to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal, supra*, 29 FMSHRC at 125, 132-33.

As discussed in detail above in the S&S analysis, the accumulations on the scoop were reasonably likely to cause a serious injury to miners in the area. Specifically, I found that the arcing and sparking from the PTO cable fouling against the drive shaft would have ignited the oil-saturated coal accumulations on the scoop, if left unabated during continued normal mining operations. The danger posed by the ignition, however,

[16] Respondent argues that the Secretary failed to prove that two other MSHA inspectors discussed with Respondent the importance of cleaning electrical equipment five days prior to the citation. R. Br. at 25; Tr. at 315-20. Although, the notes by inspector Smoot are almost impossible to decipher, inspector Church's notes clearly indicate that inspectors discussed the "conditions of [electrical] equipment" and "the serious number 75-400 citations of [electrical] equipment." P. Ex. 7; *see also* Tr. at 317.

is mitigated by the fact that the ¾ to two inches of coal dust likely would not create enough smoke to cause fatal or permanently disabling injuries and that only one miner would likely be affected. *See* P. Ex. 1 (Roberts believed that the hazard would only reasonably result in result in "lost workdays or restricted duty" to one miner). Further, as the fire would be contained in sealed compartments, the risk of propagation is diminished. Accordingly, I conclude that the moderate degree of danger posed by the violation is neutral in the unwarrantable failure analysis.

v. The Respondent's Knowledge of the Existence of the Violation and Whether the Violation was Obvious

The Commission has held that the knowledge factor in an unwarrantable failure analysis is established by "the failure of an operator to abate a violation [that] he knew or should have known existed." *Emery Mining Corp*., 9 FMSHRC 1997, 2002-03 (Dec. 1987); *see also*, Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975) ("Coal Act Legis. Hist.").

There is no evidence that Respondent knew of the violative condition prior to the issuance of the Citation. The condition is not mentioned in pre-shift or on-shift reports and there is no testimony establishing the Respondent's advance notice of the violative condition. Similarly, the record does not support a finding that Respondent should have known of the accumulation, or that the condition was obvious. As Roberts noted, the inner-workings of the scoop were required to be examined only once a week pursuant to MSHA's interpretation of section 75.512. Tr. at 294. To properly examine the electrical components, a mechanic and at least one other miner would have to remove the heavy top covers that were bolted to the machine. Tr. at 294, 379. Although some amount of oil could be observed while the covers were on the scoop, it was not until the covers were removed that the accumulations were obvious and "basically staring you right in the face." Tr. at 323, 366. Roberts did not find any observable oil leaks during his inspection and failed to quantify the amount visible without removing the covers. Tr. at 358. As such, I cannot determine if the visible oil was plentiful enough to constitute an accumulation under section 75.400 or if the oil was the result of minor, permissible spillage incurred while refilling the hydraulic oil reservoir.

As the Secretary has failed to demonstrate that Respondent knew or should have known about the existence of the violation, these factors weigh against an unwarrantable failure finding.

vi. The Respondent's Efforts in Abating the Violation

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, *supra*, 31 FMSHRC at 1356, *citing Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). The focus is on abatement efforts made prior to issuance of the citation or order. *Id.*

As set forth above, Respondent was placed on notice that greater efforts were necessary to comply with Section 75.400. I find that Respondent undertook some reasonable efforts to abate the violation prior to the issuance of the citation because the scoop was washed on November 20, four days prior to the citation. Accordingly, I conclude that this factor weighs against an unwarrantable failure finding.

vii. Conclusion Regarding Unwarrantable Failure Factors

In sum, after considering the relevant Commission factors, I conclude that the violation in Citation No. 6667482 was not the result of an unwarrantable failure to comply with section 75.400. The violation was extensive, but persisted for only a short amount of time relative to the MSHA mandated inspection schedule. Respondent did not have knowledge of the violation. In addition, the condition was not particularly obvious given the difficulty accessing the inner-workings of the scoop. Respondent was placed on notice that greater efforts were necessary to achieve compliance with Section 75.400 and the condition was moderately dangerous. Perhaps most importantly, however, Respondent was able to adduce evidence at hearing showing that inspector Roberts' unwarrantable failure analysis was based, at least in part, on the erroneous assumption that the condition was not addressed when reported to management in pre-shift reports.

3. Negligence

After close examination of the record, I find that Respondent's negligence should be reduced from "high" to "moderate." As stated above, I find that Respondent undertook reasonable efforts to address the violation prior to the issuance of the Citation because the scoop was washed on November 20, four days prior to issuance of the Citation. Accordingly, this mitigating factor supports a moderate negligence finding.

VII. Order No. 6668437

A. Findings of Fact

On November 29, 2007, MSHA inspector, Danny Ramsey, conducted a ventilation survey of the 2C1 worked-out area.[17] Safety staff member, Bob Clarida, accompanied Ramsey during the inspection. Tr. at 198-200.

Ramsey took notes while conducting the inspection. P. Ex. 11. He issued 104(d)(1) Order No. 6668437, which alleged a violation of 30 C.F.R. § 75.364(a)(1) for inadequate weekly

[17] Ramsey has been in the underground coal mining industry for over thirty-nine years and is currently employed as a roof control specialist in MSHA's Benton, Illinois field office. His duties include review of mine roof control and ventilation plans, and conducting on-site inspections. Prior to working for MSHA, Ramsey held various positions of authority at large underground coal mines. Tr. at 194-97.

examinations in the worked-out area of deepest penetration. Tr. at 198-99; P. Ex. 10. The Order states:

> Inadequate weekly examinations have been performed in the 2Cl worked-out area in that the deepest penetration of the worked out area has not been examined since 6/29/07. Water, up to four feet in depth is present across #1 to #6 entries from the face to 3 crosscuts outby and prohibits examinations to the deepest point of the worked-out panel. Methane in excess of 5% is present in entries #1 and #2 and an oxygen-deficient atmosphere of 18.5% is also present in entry #1. The certification board has been progressively moved outby as the water has accumulated. The original certification board located at the deepest penetration of the worked-out area is dated 06/29/07.

P. Ex. 10.

During the inspection, Ramsey and Clarida started at the mouth of the worked-out area and traveled to the evaluation points (EPs), the locations at which methane and oxygen readings were required to be taken under the standard. Tr. at 200. The first EP that they encountered was at the upper left part of the area. They then went to the right side of the area, first in Entry #6 and then Entry #1. *Id*. Once they arrived at Entry #1, Ramsey used his handheld Solaris device to detect "nine-tenths percent of methane" in that entry. Tr. at 201.

Ramsey observed a date, time, and initials (DTI) board, about thirty to forty feet inby from where he detected the methane. Tr. at 201. Mine examiners use DTI boards to certify that they have examined an area. Tr. at 202. Ramsey testified that examiners typically conduct their tests in close proximity to the DTI boards. *Id*.

Proceeding inby along Entry #1, Ramsey encountered progressively deeper water and progressively higher methane concentrations. He detected 1.5% methane about half-way between the outby DTI board and the face. At this point, Ramsey was in four feet of water that nearly reached his thighs. Tr. at 204; P. Ex. 13. Once Ramsey and Clarida reached the face, Ramsey's Solaris detected explosive levels of methane equaling or exceeding 5 percent%. Tr. at 205. Ramsey collected two atmospheric samples at the face. Later lab tests revealed an explosive mixture of 5.880% methane and 19.25% oxygen. Tr. at 206-208. By contrast, Clarida testified that his spotter only identified 3.4% methane and 19.4% oxygen. Tr. at 245; R. Ex. 5. Clarida attributed the discrepancy to the fact that the methane not equally dispersed or the fact that Ramsey had taken a sample closer to the roof. *Id*. at 245-46.

Ramsey observed a second DTI board at the area of deepest penetration on the right side of the 2C1 mined-out area. Tr. at 206; P. Ex. 13. According to the second DTI board, this area was last examined on June 29, 2007. Tr. at 212. Ramsey observed that the outby DTI board was 300 feet away from the inby DTI board, where the examinations were required to be conducted. Tr. at 214.

Following the issuance of the Order, Clarida spoke with Brad Pate, an hourly examiner and the sole miner tasked with performing weekly examinations of the methane levels at the 2C1 area. Tr. at 259-60. Clarida testified that, without consulting management, Pate determined that he did not have to travel all the way to the face on account of the water accumulations. *Id*. Clarida believed that Pate "didn't think he was doing anything wrong" by testing the methane levels at the outby location. Tr. at 260.

According to Ramsey, five months or twenty-one weeks had transpired between the last proper examination of the 2C1 worked-out area and the time Ramsey issued Order No. 6668437. Rasmey concluded that Pate conducted at least twenty weekly examinations of the 2C1 area at the incorrect, unapproved, and non-compliant location. Tr. at 214.

Ramsey determined that the explosive concentration of methane and the presence of possible ignition sources in the form of battery-powered vehicles or roof falls made it reasonably likely that an explosion would occur. Tr. at 216-17. He testified that "an examiner traveling through . . . with battery-operated vehicles doing the examinations, and potential roof falls . . . could cause an ignition source." Tr. at 216. Ramsey also testified that in the past he had personally observed many roof falls causing sparks during the retreat mining process. He determined that the sparks would constitute an ignition source as well. Tr. at 216-17.

In the three days prior to the issuance of the Order, Ramsey took part in three meetings with mine management to discuss inadequate workplace examinations. On November 26, 2007, Ramsey met with Bob Hill, shift mine manager. Tr. at 219-20; P. Ex. 11. The next day, Ramsey spoke to Hill and James Ward, mine general manager. The day after, Ramsey met with Ward and Clarida. *Id*. Ramsey admitted, however, that the meetings did not address weekly exams performed under section 75.364, the cited standard. Tr. at 226-27. Rather, the meetings addressed Respondent's inadequate workplace examinations generally. *Id*.

At the time of inspection, several curtains had been knocked down in Entry No. 1. Tr. 222. Clarida testified that this caused the air to be short-circuited without traveling all the way around the faces. Tr. at 238. Instead, Clarida claimed that the air traveled straight across into Entry No. 1. *Id*. Clarida testified that the area inby the location where the air entered Entry No. 1 was not ventilated adequately, although the area outby that point was ventilated adequately. *Id*. Clarida testified that if the curtains had been up, the airflow would have traveled around the faces towards the inby DTI board where the tests were supposed to be conducted, and the methane levels in that location would have been proper. Tr. at 226-27; R. Ex. 5; P. Ex. 13 (maps showing path of ventilation with curtains down versus curtains up). Clarida further testified that he observed the curtains that had been knocked down, and he was preparing to re-hang them to dilute the methane, until Ramsey instructed him not to do so. Tr. 247-48.

Ramsey testified that a curtain was down in the water, making it unlikely that Respondent would have found it. Ward and Clarida admitted that they had no idea how long the curtain had been down. Tr. at 253-54, 258. Ward asserted that after he hung curtains back up, the methane levels in the area of deepest penetration were proper. Tr. at 258.

Ramsey designated the gravity of the violation as "reasonably likely" to result in "fatal" injuries to one person, and thus S&S. He designated Respondent's negligence as "high." He further designated the violation as an unwarrantable failure. P. Ex. 10.

B. Disposition

1. Relevant Legal Principles

Section 75.364(a)(1) requires mine examiners to conduct weekly examinations in the worked-out areas of deepest penetration. The purpose of the standard is to ensure that the mine's ventilation is working properly to prevent methane and other noxious gases from accumulating, as well as to prevent oxygen levels from becoming too low.

Section 75.364(a)(1) provides:

> At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the air is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and leaves the worked-out area. An alternative method of evaluating the ventilation of the area may be approved in the ventilation plan.

2. S&S

I find the Secretary has not established that the violation is S&S. Respondent concedes that a violation of section 75.364(a)(1) has occurred because it conducted inadequate weekly examinations in the worked-out area of deepest penetration. The Secretary has also satisfied the second prong of *Mathies* because the violation contributed to a discrete explosive hazard.

The Secretary, however, has failed to establish the third *Mathies* element because he has not shown that the violation was reasonably likely to cause an explosion or serious injury. The Commission has long held that where there is a violative condition that poses a risk of fire or explosion, a finding of S&S requires a demonstration of a "confluence of factors," such as the presence of a fuel source in proximity to a potential ignition source, to establish a reasonable likelihood that ignitions or explosions will occur. *See, e.g., Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).

Here, the Secretary has alleged two possible sources of ignition: roof falls and the use of energized vehicles. First, the Secretary argues that the battery-operated vehicle, which Ramsey testified was used to access the area, could constitute an ignition source if maintained

improperly. Tr. at 216; P. Br. at 31. I find this to be, at best, an unlikely scenario. To reach the area of deepest penetration, where the methane levels had reached explosive levels, Ramsey and Clarida waded through four feet of water. Tr. at 204. It is extremely unlikely that a miner would be able to drive an electric vehicle through this depth of water. Tr. at 222 (Ramsey testified that the vehicles could not make it through the water.). Even if it were possible to do so, the Secretary's case is premised on the fact that miners, and presumably their vehicles, were *not* entering the area to conduct required inspections. As this area of the mine was inactive and primarily accessed only for examination and inspection, it is unlikely that a battery-operated vehicle would access the area where the methane had reached explosive concentrations.

Even if the battery-operated vehicle reached the area with an explosive concentration of methane, the Secretary has not shown that the battery-operated vehicles were reasonably likely to ignite the methane.[18] The Secretary did not offer any evidence that a permissive, battery-operated vehicle could ignite the methane if maintained in proper condition. Further, although Ramsey testified that the mine had received citations for impermissible vehicles in the past, the vehicle that was used to access the area on the day of the inspection was maintained in permissible condition. Tr. at 222, 235. The Commission has remanded an ALJ's S&S finding where, as in this case, the electric machinery alleged to be an ignition source was maintained in permissible condition and no evidence was proffered to show that the electric equipment was capable of getting hot enough during normal use to cause ignition. *Amax Coal Co.*, 18 FMSHRC 1355, 1358 (Aug. 1996).

According to MSHA's training material, explosive methane-air mixtures of 5-15% methane and at least 12% oxygen need either a very small spark (.3 millijoules) or temperatures exceeding 1165 degrees Fahrenheit to ignite. R. Ex. 4 at 23. The Secretary does not allege that the vehicles used to access the area were impermissibly creating sparks or excessive temperatures, but rather that over the service life of the vehicle, problems could arise that would cause such conditions. P. Br. at 31. The Commission, however, has found that "[a] finding that the passage of time increases the likelihood of an injury-producing event cannot, standing alone, satisfy the requirements of either the substantial evidence test or the third element of Mathies." *Amax Coal Co.*, 18 FMSHRC 1355, 1359 (Aug. 1996). Accordingly, I decline to find that the battery-operated vehicles were an ignition source.

Second, the Secretary argues that the area of high methane concentration is prone to roof falls, which can produce sparks capable of igniting methane. P. Br. at 31; Tr. at 216-17.

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[18] I discount the Secretary's argument that, assuming continued mining operations, the methane would have continue to build up until it reached active areas or areas where vehicles normally travel. Order No. 6668437 was issued for inadequate inspections, not for the presence of methane. Aside from Ramsey's testimony that the area outby was adequately ventilated and possibly capable of diluting the gas, it is undisputed that Respondent was regularly checking methane levels approximately 300 feet from the area of deepest penetration. Tr. at 214, 238. Had the concentration of methane continued to increase, it is reasonable to infer that the inspection, albeit inadequate, would serve its purpose and alert Respondent to the methane buildup.

Respondent points out that MSHA's training materials explicitly state that, while possible, such ignitions are *unlikely*. R. Br. at 32; R. Ex. 4 at 23. The training materials further state that even in carefully controlled experiments of roof fall frictional ignitions, the Bureau of Mines was only able to ignite methane-air mixtures in about 8% of the trials. R. Ex. 4 at 23. The study concludes that the most likely potential for ignition of methane is when the roof contains large amounts of quartz, which can release a piezoelectric discharge during a roof fall. *Id*.[19]

The roof at Willow Lake is made of shale, not quartz-rich sandstone. R. Ex. 4 at 24; Tr. at 233. Although no testimony regarding the exact quantity of quartz in the Willow Lake mine roof was presented at hearing, Ramsey conceded that roofs composed of shale are less likely to create sparking. Tr. at 233-234. The Commission has held that where the Secretary is unable to provide "any credible or probative evidentiary support for any conclusion that ready ignition sources capable of propagating an explosion of . . . methane . . . [are] present" a judge may reasonably conclude that a roof fall does not constitute an ignition source. *Island Creek Coal Co.*, 15 FMSHRC 339 (Mar. 1993) (upholding ALJ's decision that sandstone roof did not constitute an ignition source where the operator established that the roof above a methane concentration did not contain large amounts of quartzite); *see also Consol of Kentucky, Inc.*, 30 FMSHRC 1, 7 (Jan. 2008) (ALJ) (crediting the aforementioned MSHA training materials and finding that the ignition of methane by a roof fall or by lightning "was, at best, a theoretical possibility"); *Cumberland Coal Res., LP*, 27 FMSHRC 295, 319-20 (Mar. 2005) (ALJ) (where the inspector originally alleged roof falls as a possible ignition source, "virtually all of the witnesses, including [the inspector], testified, consistent with . . . MSHA training materials, that a roof fall is an 'unlikely' source of ignition").

While Ramsey testified that he had seen sparking in roof falls during retreat mining, he did not identify what had caused the sparks that he observed. Tr. at 217. Ramsey did, however, suggest that the mine where he had observed sparking may not have had a shale roof like the one at Willow Lake. Tr. at 233. As such, Ramsey did not establish a reasonable basis for his belief that the roof at the location of the methane concentrations could cause sparking. I further note that Ramsey was not admitted as an expert, has no formal scientific or engineering education, and admitted that his opinion was not informed by MSHA research or scientific testing. Tr. at 233; *cf., Island Creek Coal Co*., 13 FMSHRC 592, (Apr. 1991) (ALJ) (the Secretary and Respondent offered expert witnesses with backgrounds in mining engineering to testify about the possibility of roof falls igniting methane in an underground coal mine). Accordingly, I give Ramsey's testimony on this issue little weight.

Consistent with Commission precedent and the Bureau of Mines study endorsed by MSHA's training materials, I am not convinced that Ramsey's testimony is enough to support

[19] I decline to give any significant weight to Ramsey's hypothesis that roof bolts in the shale roof might cause sparking. *See* Tr. at 233. I also do not give much weight to Clarida's testimony that the dampness of the area would prevent a roof fall from igniting the methane. *See* Tr. at 259. Neither argument was fleshed out fully at hearing, and MSHA's training materials did not mention roof bolts or the presence of dampness or water as important aggravating or mitigating factors.

the general proposition that all roof falls are reasonably likely to cause heat or sparking sufficient to ignite methane. Accordingly, I find that Order No. 6668437 is not S&S.

3. Unwarrantable Failure

a. Application of the Law

Having duly considered each unwarrantable failure factor below, I find that the Secretary established by a preponderance of the evidence that Respondent exhibited a "serious lack of reasonable care" by failing to conduct weekly examinations in the area of deepest penetration. The violation was obvious, extensive, and lengthy in duration. Respondent also had knowledge of the violation and undertook no reasonable effort to eliminate it.

i. The Extent of the Violative Conduct

The violation was extensive because there was a large distance between the location where Pate was conducting weekly inspections and the area of deepest penetration. The outby DTI board was progressively moved back, approximately 3 to 3 ½ crosscuts or 200 to 300 feet away, from the location where the examinations should have taken place. Tr. at 203-06, 213-14; P. Ex. 13.

The extensiveness factor is slightly mitigated by the relative ease by which the methane problem was corrected. After ventilation was restored to the face, the methane buildup was quickly dispersed. Clarida testified that after he re-hung the fallen curtain and several additional curtains, another test of the methane levels at the area of deepest penetration found a concentration of methane that ranged between .6% and .7%. Tr. at 257-58.

On balance, I find that the extensiveness factor weighs slightly in favor of an unwarrantable failure finding.

ii. The Duration of the Violative Conduct

The violation persisted for a lengthy period of time. The DTI boards indicated that the 2C1 area had not been examined at the proper location for more than five months. Tr. at 219, 253. Section 75.364(a)(1) requires worked-out areas to be examined weekly. Therefore, at least twenty examinations were performed at the wrong location. P. Br. at 33. Thus, the duration of the violation weighs strongly in favor of an unwarrantable failure.

iii. Whether Respondent Was Placed on Notice that Greater Efforts Were Necessary For Compliance with Section 75.364(a)(1)

Respondent was not given adequate notice that additional compliance efforts were necessary to comply with the standard. Although Ramsey had three meetings with Respondent's management addressing inadequate examinations in the three days prior to the Order, these meetings addressed examinations generally. Tr. at 219-20, P. Ex. 11. While the Commission

has found that past violations may be evidence that an operation was placed on notice that greater efforts were necessary to achieve compliance, such repeated violations must be *similar* in nature. *IO Coal, supra*, 31 FMSHRC at 1353-55; *Amax Coal, supra,* 19 FMSHRC at 851; *see also Consolidation Coal, supra,* 23 FMSHRC at 595.

The past violations addressed during the meetings with MSHA did not address violations of section 75.364(a)(1). In fact, Respondent had only received one minor citation under this standard in the prior fifteen months for which a penalty of $150 was proposed. *See* History of Violations for Big Ridge Inc., MSHA, MINE DATA RETRIEVAL SYSTEM, (search "MSHA Mine ID" for "1103054"; then select "VPID" radio button select "Get Report" button; then enter date "11/29/2007" and select "Get Info" button). Although past violations do not necessarily have to be of the same standard to put the operator on notice, the Secretary has not offered any evidence of the content of the meetings with mine management other than to broadly characterize the meetings as dealing with inadequate workplace examinations. P. Br. at 33. A meeting to discuss inadequate examination could cover anything from failing to conduct weekly checks on electrical equipment to a miner failing to conduct an on-shift examination of a feeder belt. Furthermore, there is no evidence that Pate was in any way involved in the workplace examinations addressed in the meetings.

Given the wide range of issues that could have been discussed, I cannot assume on the record before me that the meetings adequately put Respondent on notice that greater efforts were necessary for compliance with section 75.364(a)(1). Accordingly, I find this factor weighs against a finding of unwarrantable failure.

iv. Whether the Violation Posed a High Degree of Danger

As discussed in detail above in the S&S analysis, Respondent's failure to test for methane at the area of deepest penetration did not pose a high degree of danger. While the methane and oxygen concentrations were at explosive levels, there was no identifiable ignition source which could reasonably be expected to ignite the gas. Accordingly, I conclude this factor weighs against an unwarrantable failure finding.

v. The Respondent's Knowledge of the Existence of the Violation and Whether the Violation was Obvious

Respondent had knowledge of the violation and it was obvious. Pate, the only mine examiner tasked with conducting weekly examinations of the 2C1 worked-out area, was an agent of Respondent. Tr. at 259; 265. Therefore, Pate's conduct and knowledge may be imputed to Respondent for unwarrantable failure purposes. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991).

As noted above, the failure to perform the requisite examination at the appropriate location existed for over five months. The 2C1 worked-out area was examined at the incorrect location at least twenty times. Tr. at 259-60.

Furthermore, it was obvious that the examinations were not being conducted at the area of deepest penetration in accordance with the standard and the mine's ventilation plan. Instead, examinations were performed approximately 200 to 300 feet from the appropriate examination area. Tr. at 203-06, 213-14; P. Ex. 13. When asked how he could tell that the outby DTI board was not in the area of deepest penetration, Ramsey stated, "[w]ell, I could look up the entry and [could] see that it wasn't, for one thing, as far as my light would shine, and then it was at the water's edge that made me believe they were moving the board out as the water got deeper." Tr. at 220.

At hearing, Ward testified that Pate never told him that he conducted examinations in the wrong location. Tr. at 260. Even if true, as Respondent's agent, Pate's actions and knowledge regarding the existence of the violation are imputed to Respondent. *Rochester & Pittsburgh Coal Co.*, *supra*, 13 FMSHRC at 194. Therefore, I conclude that Respondent had knowledge of an obvious violation and these factors support an unwarrantable failure finding.

vi. The Respondent's Efforts in Abating the Violation

Since Respondent was not placed on notice that greater efforts were needed to comply with workplace examination requirements, I find this factor to be neutral in the unwarrantable failure analysis.

vii. Conclusion Regarding Unwarrantable Failure Factors

In sum, after considering the relevant Commission factors, I conclude that the violation in Order No. 6668437 was the result of Respondent's unwarrantable failure to comply with section 75.364(a)(1). Aggravated inattention to an obvious, recurring problem was present. The record establishes that Respondent failed to conduct a weekly examination of the worked-out area at a proper location for over five months. The violation was extensive, obvious, and Respondent knew of its existence. Accordingly, I affirm the unwarrantable failure designation for Order No. 6668437.

4. Negligence

I find that Respondent's negligence was higher than alleged by the Secretary. Although the Secretary has designated the negligence as high, it is clear from the record before me that the operator's conduct was much more than ordinary negligence, exhibiting the absence of the slightest degree of care. Pate, clearly acting as an agent of the operator, failed to examine the 2C1 area at the area of deepest penetration for more than five months. Tr. at 219, 253. Ward testified that when he asked Pate why he had stopped conducting examinations at the correct location, Pate responded that he had done so to avoid having to drudge through the accumulated water and get wet. Tr. at 260. Thus, Pate deliberately substituted his desire to avoid a minor discomfort for the clear and unambiguous meaning of section 75.364(a)(1), a mandatory safety standard. While Pate may not have informed management of his decision to move the location of the mandated examination, the fact that Respondent maintained little or no supervision over its agents is apparent from the five months during which this violative conduct continued. *See id.* Accordingly, negligence is modified from "high" to "reckless disregard."

VIII. Civil Penalty

A. Relevant Legal Principles

Under section 110(i) of the Act, "the Commission shall have authority to assess all civil penalties provided in this Act." 30 C.F.R. § 820(i). Although the Secretary issues citation and orders under the Act and proposes civil penalties, it is the Commission that is responsible for assessing civil penalties and providing other appropriate relief. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The Commission's assessment of penalties is a *de novo* determination based on the six statutory criteria specified in section 110(i) of the Act. Section 110(i) of the Act requires the Commission to assess civil monetary penalties considering: (1) the operator's history of previous violations, (2) the size of the business, (3) the level of negligence by the operator, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. *See Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000)

In exercising this discretion, the Commission has reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the. . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. . . ." *Spartan Mining, supra*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg, supra*, 5 FMSHRC at 293.

The Secretary has proposed a penalty of $40,180.00 for Citation No. 6679907, $45,708.00 for Citation No. 6683969, $44,600.00 for Citation No. 6667482, and $60,000.00 for Order No. 6668437. With the exception of Citation No. 6683969, the Secretary has not provided the Court with documentation showing how each proposed penalty was calculated. Further, the Secretary did not provide the Narrative Findings for Special Assessment nor was any testimony adduced at hearing or arguments made in post-hearing briefs on the appropriateness of the specially assessed penalties.

Pursuant to Commission Rule 28(b)(2), the Secretary is required to include in the Petition for Assessment of Civil Penalty "a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act." The Petitions that the Secretary files, however, are form documents that are essentially the same in every case. In lieu of filing a Petition with the prescribed explanations, the Secretary customarily attaches the information as Exhibit A to the Petition. For "normally assessed" proposed penalties, the Secretary will attach a copy of each citation/order and a printout showing how the proposed penalty was calculated in accordance with 30 C.F.R § 100.3. For "specially assessed" proposed

penalties, the Secretary will also include the Narrative Findings for a Special Assessment, which set forth the reasoning for a special assessment.

After reviewing the proposed penalties against the undersigned's calculations under Part 100, it would appear that Citation Nos. 6679907 and 6683969 have been proposed under the normal assessment formula set forth in section 100.3, while Citation No. 6667482 and Order No. 6668437 appear to have been specially assessed. Although a specially assessed penalty may have been appropriate for Citation No. 6667482 and Order No. 6668437 given the danger allegedly posed by the hazards, the Secretary has failed to provide any evidence concerning the justification for the special assessments. In these circumstances, I decline to assess a penalty consistent with the special assessment formula. *See generally*, MSHA, Special Assessment Guidelines (2011), www.msha.gov/PROGRAMS/assess/SpecialAssess/SpecialAssessments2011.pdf.

B. Applying the Section 110(i) Criteria

The parties have stipulated that for the purposes of accessing a penalty, Respondent is a large operator and that as such, the penalties proposed by the Secretary will not affect Respondent's ability to remain in business. The parties have further stipulated that Respondent demonstrated good-faith in abating the violations after issuance of the Citations and Order.

Respondent's history of previous violations is based on the total number of violations and the number of repeat violations of the same provision of a standard that became final in the preceding fifteen-month period. 30 C.F.R § 100.3(c). Citation No. 6679907 was issued on September 19, 2008. In the fifteen months prior, 107 violations of section 75.400 became final, and Respondent had approximately 0.87 violations per inspection day. *See* Mine Safety & Health Admin., Data Retrieval System ("MSHA DRS"), http://www.msha.gov/drs/drshome.htm (Big Ridge Inc. ("1103054"), VPID (09/19/2008)). Citation No. 6683969 was issued on January 29, 2009. In the fifteen months prior, 153 violations of section 75.400 became final, and Respondent had approximately 1.05 violations per inspection day. *Id*. (Big Ridge Inc. ("1103054"), VPID (01/29/2009). Citation No. 6667482 was issued on November 24, 2007. In the fifteen months prior, seventy violations of section 75.400 became final, and Respondent had approximately 0.97 violations per inspection day. *Id*. (Big Ridge Inc. ("1103054"), VPID (11/24/2007). Order No. 6668437 was issued on November 29, 2007. In the fifteen months prior, only one violation of section 75.364(a)(1) became final, and Respondent had approximately 0.98 violations per inspection day. *Id*. (Big Ridge Inc. ("1103054"), VPID (11/29/2007).

Given these facts and the negligence and gravity criteria discussed above, I assess civil penalties of $9,634.00 for Citation No. 6679907, $45,708.00 for Citation No. 6683969, $3,143.00 for Citation No. 6667482, and $8,893.00 for Order No. 6668437, thereby resulting in a total civil penalty of $67,378.00. This penalty assessment is based on the statutory criteria of section 110(i) and the deterrent purposes of the Act. *Cf*., *Black Beauty Coal Co.*, *34* FMSHRC 1856 (Aug. 2012).

IX. Order

For the reasons set forth above, Citation Nos. 6679907 and 6667482 are **MODIFIED** to reduce negligence from "high" to "moderate." Order No. 6668437 is **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. Order No. 6668437 is further **MODIFIED** to *increase* negligence from "high" to "reckless disregard." Citation No. 6667482 is further **MODIFIED** to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, thus removing the unwarrantable failure designation. Citation No. 6683969 is **AFFIRMED** as proposed. It is further **ORDERED** that the operator pay a total penalty of $67,378.00 within thirty days of this Order.

/s/ Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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